

## Courts and Commissions: An Address Delivered Before the Milwaukee County Bar Association in April 1921

Thomas E. Lyons

Follow this and additional works at: <http://scholarship.law.marquette.edu/mulr>



Part of the [Law Commons](#)

---

### Repository Citation

Thomas E. Lyons, *Courts and Commissions: An Address Delivered Before the Milwaukee County Bar Association in April 1921*, 6 Marq. L. Rev. 5 (1921).

Available at: <http://scholarship.law.marquette.edu/mulr/vol6/iss1/2>

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact [megan.obrien@marquette.edu](mailto:megan.obrien@marquette.edu).

## COURTS AND COMMISSIONS

An Address Delivered Before the Milwaukee County Bar Association in April, 1921, By THOMAS E. LYONS of the Wisconsin Tax Commission

Wendell Phillips was in the habit of commencing one of his lectures by saying, "When I was a young man, I practiced law, God forgive me." I have a similar confession to make. Twenty years' experience in the general practice of law as actively engaged as an indiscriminating public demanded, and ten years' connection with an administrative commission have given opportunity for observing the procedure of these two forms of organization, and of comparing their methods and results. The net outcome of this experience is certain impressions, more favorable to commissions than to courts, which it is the purpose of this paper to set forth. I can hardly subscribe to the summary remedy prescribed by Dick the butcher when he advised that "the first thing we do, let's kill all the lawyers," for my license is still unrevoked. But as to some of their practices I can repeat with sympathy the response of a member of Congress who, when asked whether he was going to attend the funeral of a deceased and formerly obstreperous fellow-member, replied, "No, I can't go to the funeral, but I'm in favor of it."

For generations past, indeed for centuries, courts have been well recognized and thoroughly established institutions in all civilized governments, Oriental, Latin and Anglo-Saxon. They were created for the purpose of deciding controversies involving personal or property rights, or in other words, of administering justice among the peoples of their respective states. In the performance of this duty certain principles of right and rules of conduct were developed, which first crystallized into custom and then became law. In time an elaborate system and well-defined machinery were developed, which were supposed to be sufficiently comprehensive and flexible to solve all problems and apply to new conditions as they arose. This was the origin of the common law. Comparatively few changes were made in its structure until about the middle of the last century when the modern system of transportation and industrialism presented new and difficult problems for solution. It was then found that the system of common law and practice developed in connection with it was inadequate to meet many of the problems to which the new order gave rise.

Naturally these defects were most keenly felt where the modern industrial system was strongest. Accordingly Massa-

chusetts was the first state in the Union to create a new kind of organization to solve these problems. The movement, begun by the creation of the Massachusetts Railroad Commission in 1869, under the leadership of Charles Francis Adams, soon extended to other states, and within the last 50 years, and particularly within the last 25 years, a great volume of the business previously transacted by the courts has been transferred to administrative commissions. The Interstate Commerce Commission, the Trade and Commerce Board, and the Tariff Commission are examples of these organizations in the federal government; and utility commissions, industrial commissions, pure food commissions, tax commissions and conservation commissions are examples of the same kind under state law. The volume of business now transacted by these various commissions probably exceeds both in value and importance the business transacted by the courts.

What is the reason for, or explanation of, this movement? Why has so much of the business heretofore transacted by the courts been taken away from them and vested in other and different organizations? It can hardly be ascribed to a lack of courts for they are numerous and varied. State courts, federal courts, courts of law and courts of equity, courts inferior and courts superior, courts of original and courts of appellate jurisdiction, courts in great numbers and of many kinds. In large measure the nature of the business so transferred is of the same kind as that which courts were created to transact, namely, the determination of disputed questions of fact, and the application thereto of principles of law. If the courts were satisfactorily functioning and yet overcrowded, the natural remedy would be to increase the number of judges or create additional courts. But that was not the course adopted. Why? Certainly not for distrust of the integrity of the courts for they have enjoyed unusual immunity from criticism in this respect. Neither was it for lack of confidence in the competence or ability of judges in their professional capacity. On the contrary, the primary reason was the widespread impression that the method of doing business in court was radically out of harmony with the method of doing business out of court; that their rules were too rigid and complex, their reasoning too artificial, their procedure too technical, and their practice too dilatory and expensive for the rapidly moving and complex conditions of the modern world.

This dissatisfaction with the administration of justice is neither new nor surprising. The Mirror of Justice recites a list of 150 abuses in legal administration, concluding with the regret that execution of judges for corrupt or illegal decision had ceased. Wycliff complained that "lawyers make processes by subtlety and cavillations of law." James the First reminded his judges that "the law was founded upon reason, and that he and others had reason as well as the judges." In Lord Campbell's *Lives of the Chief Justices*, we find the charge that the bench was occupied "by legal monks utterly ignorant of human nature and of the affairs of men." During the development of constitutional government in the nineteenth century the sharp conflict between Marshall and Jefferson and their respective adherents are examples of the same feeling in this country. The twentieth century opened with vehement protest against courts, particularly in respect to the setting aside of legislative enactments, culminating in an agitation for the recall of judges and judicial decisions.

Much of this criticism is natural and inevitable and grows out of the inherent difficulty in the administration of justice. Municipal law must of necessity be expressed in general terms, and the application of general rules to specific cases will always result in differences of opinion and occasional injustice. Contrary to common belief the administration of justice is an extraordinarily difficult task. The average man has no conception of the infinite complexity of human relations, especially as exemplified in modern industrialism. Advance legislation always lags behind the evils that evoke it. It is never enacted until demanded by a strong public sentiment and many years must elapse between the inception of the agitation and its fruition in actual legislation. In the meantime, the advance elements in the community chafe against the law as it exists and as soon as one particular grievance has been met, the march of progress requires additional changes, and thus the cycle continues. Difficulties of this character are natural and unavoidable, but there are other equally annoying and easily curable defects which cannot be so readily condoned.

Some of these defects relate to the rules of substantive law as enacted by the legislature or developed by judicial decisions, many of which are artificial and archaic to the lay mind. For example, deeds and bonds are still required to be executed under seal, although seals have long since ceased to exist or have significance.

The use of seals originated as a means of identification when few of the parties to written contracts could either read or write. Now, most of us, like the clerk of Chatham, can "read and write and cast accounts," yet in Wisconsin, and in most other states today the title to land cannot be conveyed from one person to another unless the instrument is executed under seal. As is well known the device used is merely a scroll, more accurately a "scrawl" after the name, which means nothing and identifies nothing. "Is not this a lamentable thing," said Jack Cade derisively, "that skin of an innocent lamb should be made parchment? That parchment being scribbled o'er should undo a man? For I did put seal once to a thing and I was never mine own man since." Why should the validity of a transfer or the rights of parties be affected by such a senseless requirement?

Another example is found in the rigid and arbitrary requirements for the execution of wills often made on a bed of pain, when the testator has barely strength enough to direct the distribution of his property, without being troubled with idle ceremony. Numberless instances have occurred where the testator's property has been distributed contrary to his desire and expressed intention through failure to comply with some meaningless formula. Again, nearly forty years ago the legislature of this state prescribed short forms for the conveyance of land, which were specifically declared to be full equivalents of the common law forms previously used. Nevertheless, four-fifths of the transfers of real estate in Wisconsin today are made according to the common law forms with their long recitals and archaic covenants, thus multiplying the opportunity for mistake in copying and increasing the expense of recording. But defects of substantive law are both less numerous and less annoying to laymen than the artificial and technical methods of practice employed by the courts long after the reason therefor has ceased to exist.

The most striking illustrations of this kind occur in our criminal law. For example, every person accused of a crime throughout the United States is in theory of law presumed to be innocent and cannot be convicted unless the proof shows him guilty beyond a reasonable doubt. Indeed, unless it be the judge, the prisoner at the bar is the most respected and best protected person in court. Opposing counsel criticize each other freely, witnesses are badgered and humiliated, jurors are treated with the utmost suspicion and actually confined in capital cases, while the ac-

cused wears a halo of innocence during the progress of the trial. He is guaranteed counsel for defense whether able to pay for it or not; he can exclude all evidence not based upon direct knowledge of the offense committed, when it is well known that most crimes are committed in secret; he can refuse to testify himself and the prosecution cannot even suggest to the jury the natural inference to be drawn from his refusal to take the stand and explain or refute the charges against him. He cannot be placed on trial at all until committed by an examining magistrate or indicted by a grand jury and it has been judicially found that a crime has been committed and that there is reasonable ground to believe the accused guilty of it. Yet in face of this finding the jury is solemnly told that the accused is presumed to be innocent, and this presumption follows him at every step of the trial and protects him on appeal even after conviction by a jury. In the ordinary case this absurd fiction does little harm for the simple reason that jurors pay small attention to it. Contrary to the court's advice, they know that few men are even arrested, much less indicted and put on trial, unless they have had some guilty connection with the offense charged. The fact of his being put on trial at all in their unschooled minds, repels any presumption of innocence which might otherwise arise.

Then there is the bogey of jurisdiction—be it known that the word "jurisdiction" is a magical term in law—it always creates a panic when suggested in court. Reduced to simple terms, jurisdiction means the right or authority of a court to try a given controversy. The statute generally defines the class or character of cases that a given court may try. Under the due process of law clause of the constitution, certain steps are then necessary to notify the party accused of the wrong committed or the crime charged. The whole object of these preliminaries is to apprise the defendant of the charges against him and to give him opportunity to explain or refute them. This is the essence of jurisdiction, and when these conditions have been complied with, and particularly if the accused appears, authority to decide according to the merits is complete. Yet, there are numerous instances where after the accused appeared and had a fair trial, convictions have been reversed or set aside for failure to observe a technical formula. For example, a few years ago, a man was tried and convicted of robbery in the state of Texas, under an indictment charging that the offense was committed in the town of Grovetown in that

state. No doubt existed as to the guilt of the accused, or the fairness of the trial. There was only one Grovetown in the state of Texas, and neither the accused, the judge, or the jury had any doubt of where the offense occurred. Nevertheless, the conviction was set aside because the name of the county in which the offense was committed had been omitted from the indictment.

A conviction for burglary committed in Westminster, Worcester County, Massachusetts, was reversed for the same reason. In West Virginia, a horse thief was released because the indictment ended in the words "against the peace and dignity of the State of W. Virginia," instead of "against the peace and dignity of the State of West Virginia." A similar ruling was made by the Supreme Court of Missouri because the word "the" was omitted in copying the words "against the peace and dignity of the state." An unsophisticated mind would naturally inquire what harm if the entire formula were omitted, innocently supposing that the important question to be determined was whether a crime had in fact been committed and if so, whether the defendant was guilty of it.

This leniency toward the accused is of long standing, and there was ample necessity for it when first adopted. It originated at a time when life was held cheap and property dear; when men were hanged for minor offenses such as stealing a sheep or a pig or cutting down a tree; when the accused was not permitted to testify in his own behalf and if convicted had no right of appeal; when the judge could punish the jury if dissatisfied with their verdict, and when in charges of felony the defendant's counsel could not even address the jury. In this state of the law the propriety and necessity of extending every safeguard to the accused was dictated by consideration of humanity and mercy, and it was during this period that these technical rules for the protection of the accused were adopted. Of course, these reasons no longer exist. Few men are accused of a crime in modern times and fewer still placed on trial therefor without some guilty connection with it, and it is extremely rare that an innocent man is convicted. If the accused is in fact innocent, he almost uniformly waives his privilege and gladly takes the witness stand to refute and confound his accusers. The plain truth is, that these fictions of law, originally designed for the protection of the innocent, have now become the shield of the guilty, and

the wonder is not that so many guilty persons escape, but that any guilty person is convicted.

What are the results of this illogical and anachronistic practice: approximately 10,000 homicides in the United States every year, and conviction of less than 2% of the perpetrators of these crimes. Out of 8,251 homicides committed in 1914, there were only 74 convictions and out of 9,230 homicides the following years there were only 119 convictions. Twenty years ago, Andrew D. White declared that "the murder rate in the United States is from ten to twenty times greater than the rate in the British Empire and other northwestern European countries." Frederick L. Hoffman, life-long student of death rates and their causes writing in the *Spectator* of December, 1915, declared that, "The number of murders at the present time, proportionate to population is about 100 homicides in the United States for every 13 in England and Wales, for every 30 in Australia, every 31 in Prussia and every 56 in Italy"; and adds that, "It admits of no argument that among the civilized countries of the world the United States stands today in deplorable contrast as regards the security of the person against the risk of homicide death."

But even more indefensible than the deficiency of our criminal procedure in the punishment of crime and consequent protection of society is the practice of the sweat box or so-called third degree, developed as a direct result of our present practice. As is well known, the practice of the third degree consists in a systematic and prolonged worrying of persons charged with crime with a view to securing a confession. Every form of cunning, deceit, threat and harassment—often going to the extent of partial starvation and physical violence, are employed for this purpose—all conducted beyond the protection of the court and without the pale of law—in flat violation of the constitutional provision declaring that the accused shall not be compelled to bear witness against himself. Is it not time for the abandonment of the technical rules which lead to these results, and the adoption of the refreshing doctrine recently laid down by the Supreme Court of Oklahoma? In refusing to set aside an indictment because of the omission of the word "the," the court said:

"We know there are respectable authorities holding to the contrary, but this court will not follow any precedents unless we know and approve the reasons upon which they are based. It matters not how numerous they may be, or how eminent the



courts by which they were pronounced. Now that our criminal jurisprudence is in its formative period, we are determined to do all in our power to place it upon the broad and sure foundation of reason and justice, so that the innocent may find it to be a refuge of defense, and protection, and so that the guilty may be convicted and taught the seriousness and danger of violating the laws of this state."

Fortunately, there are indications here and elsewhere of the gradual if slow adoption of this common sense point of view.

While the consequences of these evils are less serious in civil actions the procedure followed is equally out of line with present-day habits of thought and methods of doing business and even more dilatory and expensive.

Perhaps no branch of the law is more technical and bewildering to the average lay mind than the rules of evidence originally designed to prove the facts affecting the rights of the parties to a lawsuit. To the ordinary person and especially to jurors, chosen to decide the issues involved, the impression is often conveyed that these rules operate to conceal rather than reveal the truth, and utterly fail to disclose the exact manner in which the transaction occurred. In the first place, a great mass of information directly bearing on the issues which men of prudence and sound judgment constantly accept and rely upon in the most important relations of life, is excluded. For example, in court proceeding no party can give any testimony of a conversation or transaction with a deceased person under or through whom he claims. Nor can any third party give such testimony unless he was a direct witness of the event. No hearsay evidence, meaning thereby statements made by persons not under oath at the trial, however familiar with the transaction or otherwise reliable, can be given although three-fourths of the world's business is transacted on the faith of similar statements. If the parties undertook to put their agreement in writing, however incomplete or defective the writing may be, no oral testimony can be introduced to supplement or explain it. In a report to the Phi Delta Phi Club of New York on the simplification of the machinery of justice, in 1916, a committee of nine eminent lawyers chosen for the purpose referring to this subject stated:

"If the man in the street were by some mysterious law precluded from receiving information except according to the rules obtaining

in courts of justice and of governing his conduct accordingly, life would be intolerable."

The Supreme Court of Wisconsin ranks among the most advanced and liberal of the courts of the country in the policy of disregarding technicalities and disposing of controversies on their merits. Nevertheless, that court has not entirely outgrown the hobbling effect of these technical rules. An illustration of this fact is found in a decision rendered in 1904 in a case in which a farmer in the northern part of the state died intestate, and his widow was appointed to administer the estate. She employed an attorney, who agreed to conduct the entire proceedings for a compensation of \$400, which was paid to him in advance. After final settlement of the estate, the attorney demanded additional compensation, and on investigation it was discovered that in preparing the final judgment he had inserted a provision requiring the administratrix to pay him \$400 more. The attorney had entire charge of the court proceedings and the widow knew nothing about the provision requiring the payment of additional attorney's fees. She refused to make further payment and thereupon the attorney sued her for the balance of his alleged fees. The trial court held that the conduct of the attorney was fraudulent and dismissed the action, but the Supreme Court reversed the decision for the reason that no appeal had been taken from the judgment entered in the county court, within the time allowed by law, and that the judgment could not be reversed or modified by any other court. The widow was required to pay the full amount of the claim with interest from the date of demand. This decision was undoubtedly warranted by existing rules but the effect was to sanction a palpable fraud, and take from the widow \$425 of the remnant of an estate already meager and depleted. Can anyone acquainted with the Supreme Court of this state for the last twenty-five years, believe that any member of it approved of this result or would subscribe to the judgment entered unless he felt compelled to do so by the rigid requirements of law? The widow's opinion of "our strict statutes and most biting laws" has not been recorded, but it is easy to imagine what her attitude would be on the question of the revision of practice or the recall of judges.

Another instance from direct experience. In 1914, the tax commission had occasion to revise an equalization made by the county board of St. Croix County, and following its usual practice, one member of the commission held a hearing on the subject. All

parties to the controversy presented their evidence which was taken down by a reporter and later transcribed. Realizing that the case could not properly be decided by one member of the commission, the proceedings were adjourned to the office of the commission, without, however, specifying a fixed date, to enable all three commissioners to pass upon the question. In due course an order was entered determining the rights of the parties. Court proceedings were then instituted to set aside the order of the commission on the ground that the parties were denied opportunity to present the case before the entire commission although all three members participated in the decision. Although there was no showing that the decision rendered was unjust, the order was reversed. Thereupon, new proceedings were instituted and a further hearing held. As the parties were unable to produce any additional evidence, the same decision was entered and again contested in court, but this time the order was sustained. The result was the same in both cases, the only difference being that only one commissioner attended the first hearing while all three commissioners attended the second. Here again the action of the court was amply sustained by existing precedents. But why follow precedents the only effect of which is to prolong litigation, increase expense, and postpone the enjoyment of legal rights unless the parties have been actually injured?

But here enters the bogey of jurisdiction again and answers that as the proceedings were by certiorari, the court could not consider the merits of the controversy in that form of action, although a different result might be reached if the action had been in equity. This answer has been accepted by the legal profession for more than 60 years, notwithstanding the fact that no jurisdictional question in the strict sense was involved at all, as the court had undoubted authority over the subject matter, and the parties were duly notified and actually appeared. Moreover during all that time there was a positive statute in this state declaring that "the distinction between actions at law and suits in equity and the forms of all such actions and suits have been abolished and there is in this state but one form of action for the enforcement or protection of private rights and the prevention of private wrongs." Despite this plain provision, distinctions between actions at law and suits in equity, between actions in tort and on contract, between trespass and ejectment, between conversion and replevin, and between ordinary and prerogative writs are still pre-

served, and parties are constantly turned out of court without relief because, forsooth, they came in by the wrong door.

But it will be said that the constitutional provision declaring that no person shall be deprived of life, liberty or property, without due process of law, entitles the party to his day in court and a trial according to the established practice of the common law. But why his day in court unless he has a right to enforce or a wrong to redress? And if he has already had his day and the issue has been decided against him, why should he be given another day unless he is able to show that he had been deprived of some substantial right in the first trial. Yet judgments, orders, and solemn court proceedings are daily reopened, set aside, reversed or declared void for failure to follow the prescribed jurisdictional trail without any showing or even serious claim that another trial will materially change the result.

Is it any wonder that laymen often emerge from the trial of a law suit confused and bewildered, and impressed with the idea that the law is a mysterious and unreasonable thing, comprehensible only to trained lawyers and primarily designed for their benefit? To their minds, the whole proceedings partake of the nature of a game in which the rights of clients and the merits of the controversy are lost in a jargon of technicalities while the judge sits in solemn impersonality to see that the rules are properly observed, manifesting little or no concern for the interest of the parties or the demands of substantial justice.

As stated by Frederick D. Wells in *The Man in Court*:

"During the trial the feeling of resentment of court procedure grows; the witnesses appear like fools it is true, but the lawyer makes them act more foolish than they are. Why does the judge make such absurd rulings? The law must be an unreasonable thing and the judge evidently knows a great deal about it. Why can't the witnesses tell what they know \* \* \* the strange part is that when a witness has said something which is exactly what the jury wants to know, one of the lawyers jumps up and moves to strike that part all out—and the judge strikes it out."

Many of the defects in court procedure above cited are exceptional and standing alone would give an unfair impression of the work of courts. But I am not here eulogizing courts and lawyers, as you may have observed, and have no reluctance in disturbing their complaisance, if word of mine can do so. They are primarily responsible for the present unsatisfactory character of our legal

procedure. I appreciate that the views expressed will appear heretical to conventional lawyers, and fearing that whatever favor I have ever found among them will be forfeit, deodand and all, I hasten to remind them that similar criticisms have been repeatedly made by eminent writers and public men from Shakespeare to Dickens and Galsworthy, and from Jeremy Bentham to the author of *The Man in Court*. Neither have they escaped the criticism of their own leaders, Elihu Root, whose preëminence as a lawyer and statesman will not be questioned, denounced our present practice as "a disgrace to our profession and discredit to our institutions." Ex-President Taft declared the simplifying of our legal procedure one of the great crying needs of the country, adding that it places the poor litigant at a woeful disadvantage in legal contest with a rich opponent. Ex-President Wilson criticized the same practice in an address before the Kentucky Bar Association in 1912, and again before the American Bar Association in 1914. President Eliot of Harvard; Professor Wigmore, author and law lecturer; Roscoe Pound, dean of the Harvard Law School; Morfield Story of the Boston Bar; Frederick Coudert of New York; and many others equally able if less known, are on record to the same effect. State and national bar associations have repeatedly passed resolutions condemning the existing practice and suggesting various changes, but this was at the instance of their leaders—the great body of bench and bar, the temperamentally conservative, the complacently comfortable, and the mentally inert, have been either indifferent or opposed to the movement.

After pointing out the unsatisfactory character of present court procedure in an address before the New York Bar Association in 1914, Elihu Root outlined what such procedure should be in the following words: "American procedure ought to follow as closely as possible the methods of thought and action of American farmers and business men. The law is not made for lawyers, but for their clients, and it ought to be administered as far as possible along the lines of laymen's understanding and mental processes. The best practice comes the nearest to what happens when two men agree to take a neighbor's decision in a dispute and go to him and tell their stories and accept his judgment." Our late beloved Judge Winslow declared in an article in the *Harvard Law Review* in 1916 that "this statement contained more wisdom on the subject of legal procedure than had ever been put in the same compass before or since," adding that "it expresses the fundamental principle or

what ought to be the fundamental principle of procedure with a clearness and simplicity which has not been approached, and suggests the answer as to why there is so much complaint against courts."

If the principle stated by Mr. Root should be followed in legal procedure, how would the parties to the dispute in the supposed case proceed? Both would appear before the neighbor whose decision was sought, and each would tell his story in his own way, presenting such facts and urging such consideration as would influence the mind of a common man of practical sense and judgment. Naturally, this would include information received from all trustworthy and reliable sources, whether admissible under present rules of evidence or not. There would be no pleadings, no rigid precedents to follow, little expense and no delay. The neighbor on the other hand would take into account the statements and contentions of both parties, weigh and consider their relative force and cogency, and if he believed the statements to be true and complete, decide the case accordingly. But in doing so he would use his knowledge of the transaction involved, if he had any, and if in doubt as to the accuracy of any statement made by either party, he would probably investigate on his own account. Now this procedure almost exactly describes the practice followed by the ordinary administrative commission.

These commissions are always in session. There are no fixed terms, no juries, no formal pleadings, no rigid rules of practice, no iron-clad precedents and few lawyers. The parties present their respective claims in their own way and decisions are made upon the same kind of evidence that affects the judgment of the banker, the merchant, the laborer, and the man on the street in making their daily determinations. As a result of this simple and direct method of procedure, commissions are able to transact an enormous volume of business in a fraction of the time that would be required to do the same thing in court.

To illustrate: From its organization on September 1, 1911, to June 30, 1920, a period of less than nine years, the Industrial Commission of Wisconsin disposed of more than 100,000 claims under the Workmen's Compensation Act, involving benefits of over \$11,000,000 to injured employees. This means a disposition of over 11,000 claims a year, or approximately 1,000 per month. In 1916, the Railroad Commission disposed of 406 cases involving important questions of service, determination of rates, fixing of values

for purchase, and passing on claims for excessive charges. In the month of August, 1920, the same commission held 93 hearings or more than three per day. During the fiscal year ending July 1, 1920, 915 applications of the same character were filed, nearly all of which were disposed of during the year. Again, the tax commission is required to assess the property of all steam and street railroads and telegraph companies, and supervise the assessment of all other property in the state, aggregating over \$4,500,000,000 in value and producing a tax of about \$75,000,000 every year. The tax paid by the five principal railroads of the state, namely, the Northwestern, the St. Paul, the Saulte Ste. Marie, the Burlington, and the Omaha amounts to about \$4,000,000 every year, and for several years past the representatives of these roads have elected to appear at a joint hearing as to the amount and fairness of their assessments. In recent years the financial condition of these roads has been one of declining earnings and increasing expenses calling for the utmost economy in management and as taxes are a large part of their expense, they have been watched with special care. Nevertheless, at no time during the last ten years has the hearing on the assessment of these five roads occupied more than one day, and their claims have generally been presented in half a day.

These results are in large part due to the simple and informal procedure above outlined, but in greater measure to the practice followed by all commissions of making independent investigation in advance of the problems arising in their respective fields. When a railroad company objects to a proposed assessment or a public utility applies for an increase of rates, or a corporation protests against the amount of compensation allowed to an injured employee, the commission charged with the administration of the service does not approach the question as a new one each time, but has a mass of information carefully analyzed and tabulated to guide it in disposing of the case.

Herein lies the great advantage of the practice of commissions over that followed by the courts in contested matters—their power of independent investigation. Whenever the evidence produced by the interested parties sharply conflicts or is incomplete, incredible or otherwise unsatisfactory, commissions are not only authorized but required to investigate for themselves and a body of trained experts is maintained for that purpose. For example, one of the primary functions of the railroad commission is to fix rates and determine the price when a municipality elects to take

over a utility. The pivotal question in both cases is the value of the property to be acquired, or upon which the rates are to be based. The evidence presented by the interested parties is often wholly irreconcilable, and in such cases trained engineers are directed to examine the property and fix its value. The same practice is followed and the same machinery provided by the Industrial Commission in matters of safety appliances and accident cases. Under the pure food act the exact chemical content of the product complained of, is generally the determining factor and analysis of the product by trained experts, having no interest in the controversy, is clearly the most satisfactory evidence, and a force is maintained for that purpose.

The same is true of the tax commission and the conservation commission when controversies arise in their respective fields. Under court procedure only such evidence as is produced at the trial can be considered, and all information based upon the personal knowledge of judge or jury or derived from other sources is rigidly excluded. Moreover, each of the parties to the controversy is permitted to select his own witnesses, generally the most partisan he can secure, and however irreconcilable their testimony, the court or jury is compelled to choose between them and the result in many cases is nothing less than a guess between their widely varying contentions.

Again, courts have no inherent regulative power, nor the necessary machinery for its exercise. In the ordinary case the only relief courts can give is compensation in the form of money damages after the injury has been done. Their preventive jurisdiction is sharply restricted in scope, and always limited to the parties to the controversy. Third parties similarly affected by the wrong complained of and sustaining the same or even greater injury receive no direct benefit. Thus, in actions between employer and employee for injuries in industrial employment, the court can only determine and assess the plaintiff's damages. No matter how defective the conditions of employment, the court is powerless in that action either to reward those who had sustained similar injury before, or to protect those who may be injured thereafter. The inadequacy of this remedy as a means of regulating conduct injurious to public interest is too plain for argument.



Commissions, on the other hand, are generally vested with broad powers of regulation and supplied with adequate machinery to perform that service. For example, the industrial commission is authorized to investigate places of employment reported to be dangerous before accidents occur, and to require the danger to be removed or properly guarded against by the use of all practicable and available safety devices. In like manner, the conservation commission instead of attempting to assess the damages sustained by parties injured by forest fires is primarily concerned with the prevention of such fires and the protection not only of the private owners but of the public interest in forest conservation. The dairy and food commission does not await an epidemic of ptomaine poisoning or other widespread injury from impure food until after the mischief has been done, and the damage has become irreparable, but examines the food in advance and prohibits its sale if impure. Clearly, this conservation of health and protection of public interest is of greater concern to the state than the mere awarding of damages to a private party. If so, is there any doubt that the method of investigation and regulation followed by commissions is a more effective way to attain that end than the practice followed by the courts.

This circumstance, however, is not advanced as a criticism against courts, because regulation is quite foreign to their original function, and would require such a radical change in their organization as to render it of doubtful advantage on constitutional grounds as well as from the standpoint of public policy. It is merely presented as an additional advantage of the commission method of procedure.

Realizing the inadequacy of court machinery to meet the commercial and community interests of the present, there has been a widespread movement to transfer a great volume of business requiring constant supervision, close regulation and prompt decision to other tribunals, usually in the form of administrative commissions. The federal government itself has created several of these organizations, and nearly every state in the union has one or more of them. According to the latest available information public service and utility commissions have been created in 47 states. Thirty-eight of the 48 states of the union have tax commissions, 30 states have industrial commissions in one form or another, and the number is constantly increasing.

Another evidence of the desire to escape from the rigor of legal procedure is found in the large number of special courts created within the last fifteen years, such as the New York Municipal Court, the Denver and Chicago Juvenile courts, and numerous others of like kind throughout the country. The New York Municipal Court act contains a provision for the arbitration of disputes and one of the rules promulgated for its administration specifically declares that the arbitrator "shall not be bound by the rules of evidence but may receive such evidence as may seem to him equitable and proper." Either party may be represented by counsel, but no record of the proceedings before the arbitrator shall be kept and no expense shall be incurred by him in the proceeding without the consent in writing of both parties.

Contemporaneous with the organization of the Municipal Court, a Court of Conciliation was created and among the rules of practice promulgated for that court was the following: "The justice hearing the case shall endeavor to effect an amicable and equitable adjustment between the parties \* \* \* he shall not be bound by the rules of evidence but may receive such evidence as seems to him equitable." Indeed the practice prescribed for all these tribunals is informal and direct, following the analogy of the ordinary methods of settling disputes, and they are all relieved of the technical rules of evidence which prevail in court.

A concrete example of the advantages of commission practice over that of courts is furnished by the workmen's compensation laws of New Jersey and Minnesota. Contrary to the practice in other states, the administration of the workmen's compensation act in both New Jersey and Minnesota is committed to county courts. The American Association for Labor Legislation made a critical survey of the workings of the New Jersey law, and this is how it summarized the result of the investigation in its report. "A careful study of the settlement of disputes under the compensation law through the courts shows that this method of administration defeated in a considerable measure the purposes of the compensation act because of (1) the delay of court procedure, (2) the cost of court procedure, and (3) the unfitness of courts for the settlement of compensation claims, and (4) a more unsatisfactory system, from the injured worker's point of view, would be hard to devise." Ample evidence is cited under each of the first three headings to sustain the statements made. Of course the fourth is a mere conclusion. Minnesota had similar experience and is now

endeavoring to transfer the administration of its workmen's compensation law from the courts to an administrative commission.

Another example of the results of this procedure as compared with that of courts from my own experience. Some six or eight years ago a sharp controversy in regard to taxes arose between a certain utility of this state and the village in which most of its property was located. The utility property comprised about one-third of the total value of the village and consequently was charged with about one-third of the taxes. The utility maintained that it had been over charged and refused to pay the taxes levied against it. Thereupon litigation arose which dragged its way through the courts for a period of nearly three years. The case relating to the first year's tax was pending in the Supreme Court; the case relating to the second year's tax in the circuit court; the third year's tax was delinquent and the village in financial distress. In this situation the whole matter involving \$42,500 in taxes and affecting two counties and 23 towns, cities and villages, was referred to the tax commission and adjusted by it within sixty days to the general satisfaction of both parties. It is significant that the reference of the entire matter to the tax commission was advised and brought about by a justice of the Supreme Court.

Similar examples of prompt and practical determination of involved and complicated cases by commissions might be cited indefinitely. Of course these results were secured not by reason of any superior qualifications of commissions as compared with courts. On the contrary, taken as a body the courts are manned by a higher order of ability and command more widespread confidence and respect. The very absence of formality, and the intimate contact afforded by the practice of commissions as well as their less prominent personnel have divested them of the impressive dignity which attaches to the courts. Whatever merit there may be in the service rendered by commissions is wholly due to the fact that they are permitted to approach the problems presented by direct and normal methods, while the courts are still hobbled by the precedents, incumbered by the machinery, and retarded by the dead hand of the past.

But it will be said that the precedents established and the practices developed by the courts represent the embodied wisdom and experience of ages, and are essential to that certainty in the law required for the safe transaction of business; that the aban-

donment of these rules and the disregard of these precedents will inevitably lead to decisions according to the varying judgments and caprices of the tribunals which pronounce them, and substitute a rule of men for the rule of law. There is some force in this argument which I do not seek to minimize or deny. Of course, commissions have made mistakes, and will make more of them, but no code of practice, however elaborate, will prevent that very human result.

Does not the argument for the rule of precedent as against the rule of men overlook the fact that all rules and all laws have been made by men at one time or another, and that they always have been, and always must be administered by them? If so, we are fated to be ruled by men in any event, and the choice lies between the rule of the living and the rule of the dead. Conceding the superior wisdom of the jurists of the past, is it certain that precedents laid down by them, relating to the simple instrumentalities of their day, are safer guides in dealing with railroads, telephones, motor cars, and aeroplanes (which they never dreamed of) in their varied and manifold activities than the unfettered judgment of judges of today who are in constant contact with these agencies and the problems they present? Is there not something to be said in favor of the competency of lesser men to determine the relations of modern utilities to the public, or the rules appropriate to an industrial strike or the manipulation of prices with which they are familiar, as against the dictum of a Mansfield or a Coke who never encountered these problems as they now exist, and had no thought of prescribing law for them? Moreover, insofar as precedents of the past relate to substantive law, they are constantly changed by legislatures to meet new conditions. Even the courts themselves are compelled to modify old precedents from time to time. The present generation is, therefore, compelled to, and does shape the substantive law. It is only the machinery of administration that thus far has defied change and retained its primitive characteristics, and it is against this practice that this argument is primarily directed.

But conceding the importance of certainty in the law, and the superior wisdom of the past, can it be said that the attempt to apply these precedents to the changed and changing conditions of our day has in fact given such certainty? A study of the decided cases will hardly support the claim. Nearly all questions of fact are triable by juries, and few will claim that the outcome

of a sharply contested jury trial can safely be made the basis of a business transaction. Even on strict questions of law it is well known that authorities can be found on either side of any question in some jurisdiction or another, and in many instances, the members of the same court divide on pure questions of law.

Witness the diversity of opinion among the judges of the United States Supreme Court in the Dred Scott decision, the legal tender cases, the income tax cases, the insular cases, the merger case, the workmen's compensation law, and the child labor law. In all of these cases, and indeed in every case involving widespread public interest which has come before that court for the last fifty years, the members of the bench have shown as great a diversity of opinion as would be found among an equal number of men chosen at random from the street. In the face of this record, how can it be said that certainty is secured by following the precedents of the past?

One of the purposes of the federal constitution as expressed in its preamble is "to establish justice and insure domestic tranquility," and the judicial department was created to effectuate this purpose. The constitution of Wisconsin provides that every person shall be entitled to "a certain remedy in the laws for all injuries or wrongs which he may receive in his person, property or character." Can there be any doubt that the dominant idea in both instances was the promotion of justice rather than the development of a system or the formulation of rules? The state constitution further specifies that every person "ought to obtain justice freely and without being obliged to purchase it, completely and without denial, promptly and without delay, conformably to the laws." Observe that while the constitution guarantees due process of law, it also guarantees prompt, equal and inexpensive justice. Will any open-minded and thoughtful student of the subject claim that the present practice is well calculated to secure these great ends?

Courts constantly complain of the great mass of legislation, state and national, enacted within the last quarter of a century. May it not be that much of this legislation was inspired by the widespread feeling that the justice guaranteed by the constitution could not be attained under present court procedure? If the courts had been less devoted to precedents and more alive to changing industrial conditions, is it not probable that much of this legislation might have been avoided? There are shining

examples of this open minded attitude toward the law in our own judicial history. John Marshall, the great expounder of the constitution, was not deeply schooled in the refinements of practice, nor much enslaved by precedent, but he had political sagacity and almost unerring judgment of what is wise and right. His was essentially the statesman's mind,—the large comprehension, the masterful grasp of principles, the profound insight that blazed out the early highways of our constitutional law. In the epoch-making decisions of *Marbury vs. Madison*, of *McCullough vs. Maryland*, of *Fletcher vs. Peck*, of *Cohen vs. Virginia*, and the *Dartmouth College* case, few precedents were cited and it was the statesman and not the judge that spoke. Some of his successors on the same bench and many judges of state courts have emulated his example, but the body of our judiciary has found it easier to follow precedent than to blaze out new trails.

Perhaps the most fundamental defect of court procedure is its highly contentious character, and the absence of adequate consideration of public or community interest,—a natural outgrowth of the times in which it was developed, when the aim of the penal law was vengeance rather than reform, and the maxim of might makes right was still potent. The dominant idea seemed to be to give each of the parties to the contest a free hand and the business of the judge was to insure a fair fight.

"Our ancestor was that Mulmutius  
Which ordained our laws."

Even to this day the sporting instinct is prominent in Anglo-Saxon character. During the darkest days of the World War the boast of English public was the sporting character which their soldiers displayed and it was this spirit which gave common law procedure its highly contentious character. The trial of contested cases is constantly referred to as a game and there is much warrant for the designation. Parties to an action pending in court still appear each attended by his own counsel and his own chosen witnesses, each bent on establishing his own contention in utter disregard of public interest, however vitally involved. How close the analogy to the old ordeal of battle or the latter-day duel and prize fight when principals and seconds entered the ring to establish their rights or defend their honor.

But the world we know has had a new birth since the days of the Witenagemote and the conditions then prevailing no longer obtain. Public and community interests have become infinitely

more important in human relations; a strike in the Pennsylvania coal mines, a corner on the Chicago wheat market, or the manipulation of prices in Wall Street affect not merely the parties to the transaction but thousands if not millions of innocent outsiders and vast commercial interests. Nevertheless we still treat the business of administering justice as a matter of private interest instead of something to be done for public benefit.

Realizing the importance of this latter element, as well as the absurdity of making the rules of the game paramount to the merits of the controversy, England reformed her practice more than thirty years ago. Court procedure is now much more direct and informal in that country than in this; litigation is conducted by a fewer number of courts, with greater certainty and at much less expense than in the United States. Court procedure as we know it never found favor on the European continent nor even in Scotland, and since the reform in England the United States remains the only country in the world where common law court procedure is still retained in substantially its original form. The success of a simpler practice in the country of its origin, together with the experience of tribunals relieved of its hobbles in this country effectively discount the dangers predicted by opponents of reform here.

I do not underestimate the difficulty of changing a long-established practice and carefully developed system of procedure sanctified by time and adorned by illustrious names—a difficulty enhanced by our dual form of government with its forty-eight sovereign states, each with a separate system of courts, and our federal court system independent of and above them all—and further increased by the attempted separation of the functions of government into executive, legislative and judicial departments. I do not expect or advocate sudden or radical changes in court procedure, much less the substitution of the commission system, which indeed is not a system at all but the absence of it. But I do contend that there are many practices in present court procedure which have outlived their usefulness, which are obstacles instead of aids in the administration of justice and which should be abandoned, and that the practice thus far followed by commissions contains many features which the courts may profitably study.

Justice, it has been said, is the greatest interest of man on earth, and if so, the administration of justice should be the first con-

cern of government. In the long run both law and justice are but reflections of enlightened public opinion as to what is wise and right. It is of scarcely less importance that the law be intrinsically sound, than that it be administered in a manner comprehensible to the people to which it applies and in harmony with their habits of thought and action. The law or practice which permanently disregards this view invites defeat if not contempt. I need not dwell upon the importance of respect for law in the present crowded and troubled world.

Neither do I overlook the great service constantly rendered by courts in the great mass of their work, the high character they have maintained and the wholesome and stabilizing influence they have exerted, nor do I forget the distinguished service rendered by the legal profession of this country in every crisis of its history. Their hands were active in guiding the destiny of the colonies during their struggle for independence, and in fashioning the union of the states when it was won. The names of Hamilton and Henry and Randolph and Jay; of Wirt and Pinckney and Livingston and Kent; of Webster and Marshall and Story, and countless other members of the profession are indelibly inscribed on our scroll of fame. They bravely faced and wisely solved the problems of their day; it is for their successors to face and solve the problems of our time, with equal energy and courage.

If, as Webster declared, the temple of justice is the center of our social security and general happiness, and that "whoever labors upon this edifice with usefulness and distinction, helps to clear its foundations, strengthen its pillars, adorn its entablature, or raise its august dome still higher to the skies" does that which is of the greatest moment to human society. There is honor and glory for those who make straighter the way to its shining portals and smother the approach to its sanctuary, so that all classes and interests in the community may obtain justice "freely and without being obliged to purchase it, completely and without denial, promptly and without delay," as the constitution provides.